

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HOLIDAY SYSTEMS INTERNATIONAL
OF NEVADA,

Case No. 2:10-cv-00471-MMD-GWF

ORDER

Plaintiff,

v.

(Defs.' Motion to Dismiss – dkt. no. 56;
Plf.'s Counter Motion for Jurisdictional
Discovery - dkt. no. 4)

VIVARELLI, SCHWARZ, AND
ASSOCIATES, S.A. de C.V., *et al.*,

Defendants.

Before the Court is Defendants Resort Solutions, Inc. ("RSI"), Royal Elite Vacation, LLC ("REV"), and Royal Elite Exchanges, LLC's ("REE") Motion to Dismiss. (Dkt. no. 56.) Plaintiff Holiday Systems International of Nevada ("HSI") opposes the Motion, and filed a Counter Motion for Jurisdictional Discovery. (Dkt. nos. 63 and 64)

I. BACKGROUND

HSI provides vacation-related business services for vacation ownership resorts and their owners. It has used its name since March 31, 2004, and registered its name as a trademark with the United States Patent and Trademark Office on February 24, 2009.

On or about March 16, 2007, HSI entered into an agreement with Defendant Vivarelli, Schwarz and Associations ("VSA") to market and sell HSI services in Mexico, VSA's principal place of business. On or about February 1, 2008, HSI entered into a second agreement with VSA for the right to market and sell lodging week packages to members of HSI whom VSA had enrolled pursuant to the first agreement. HSI alleges

1 that VSA breached various provisions of the two contracts beginning in January 2008,
2 including but not limited to continuing to market to VSA clients services that compete
3 with HSI, infringing on an HSI mark, and wrongfully appropriating HSI's confidential
4 assets to benefit HSI competitors. HSI alleges that Defendants RSI, REV, and REE
5 were complicit in these various breaches.

6 HSI filed this Complaint on April 5, 2010, against VSA, VSA agent/officer/principal
7 Aaron Schwarz, RSI, REV, and REE alleging Lanham Act trademark infringement,
8 Lanham Act unfair competition and false designation of origin, breach of contract, breach
9 of the covenant of good faith and fair dealing, misappropriation, interference with
10 contractual relationships, unjust enrichment, conversion, inducement to breach contract,
11 and declaratory judgment.

12 RSI, REV, and REE are Virginia corporations. VSA is a Mexico corporation, and
13 Schwarz is alleged to be a Mexican citizen. RSI, REV, and REE filed this Motion to
14 Dismiss on May 7, 2012, arguing *inter alia* that the suit should be dismissed for lack of
15 personal jurisdiction. (Dkt. no. 56.) HSI responded, arguing that the Court has personal
16 jurisdiction over the claims. (Dkt. no. 63.) In the alternative, HSI seeks an order allowing
17 limited jurisdictional discovery on the personal jurisdiction question. (Dkt. no. 64.)

18 **II. DISCUSSION**

19 RSI, REV, and REE (hereinafter "Virginia Defendants") seek dismissal of HSI's
20 Complaint on two principal grounds: (1) failure to effectuate proper service; and (2) lack
21 of personal jurisdiction.

22 **A. Service of Process**

23 Virginia Defendants complain that HSI failed to timely serve them in violation of
24 Fed. R. Civ. P. 4(m), 12(b)(4), and 12(b)(5). The Court disagrees.

25 HSI underwent an exhaustive and court-approved journey to serve Schwarz and
26 VSA, which led to the delays that Virginia Defendants now complain about. This process
27 required, among other extraordinary measures, navigating of a complex web of Mexican
28 legal rules, retaining legal services provided by Mexican co-counsel, hiring private

1 investigators in the United States and in Mexico, and involving the United States
2 Department of State. At the same time, HSI sought court approval to extend service
3 deadlines, all of which were granted.

4 Of course, the delays in service resulted from the inability to locate and serve
5 VSA and Schwarz, not Virginia Defendants. However, HSI represented to the Court that
6 it needed to serve the former first so as to not jeopardize its extended efforts at
7 effectuating service to the latter. HSI feared that serving Virginia Defendants first would
8 lead to VSA and Schwarz evading service overseas. By issuing its August 6, 2010, and
9 November 5, 2010, Orders, the Magistrate Judge effectively agreed with HSI that service
10 upon VSA and Schwarz before Virginia Defendants was proper. Furthermore, the Court
11 took no action in response to HSI's March 12, 2012, Status Report filed after the Court's
12 Local Rule 41-1 Notice, thereby authorizing the delays in service as to all Defendants.

13 Even putting aside the Court's tacit authorization of HSI's pursuit of service, the
14 Court holds that Virginia Defendants have not been unjustifiably prejudiced by delays in
15 service. While there can be no serious doubt that the interests in judicial economy and
16 in speedy resolution of litigants' disputes are best served when service is effectuated
17 with dispatch, this case presents an exceptional circumstance that justifies these
18 otherwise lengthy delays. Service upon Mr. Schwarz and VSA was essential to moving
19 this case forward; timely serving Virginia Defendants in advance would have had little
20 effect in pushing the litigation toward resolution. In fact, it might have flustered HSI's
21 efforts to serve all Defendants, if HSI's fears of evading service proved true. As a result,
22 HSI has not unreasonably delayed pursuing its claims to the prejudice of Virginia
23 Defendants, and any invocation of laches must fail.

24 For these reasons, the Court declines Virginia Defendants' request to dismiss this
25 case with prejudice for failure to effectuate timely service.

26 **B. Personal Jurisdiction**

27 Virginia Defendants also seek dismissal of HSI's Complaint arguing that this Court
28 lacks personal jurisdiction over them.

1 In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the
2 plaintiff bears the burden of establishing that jurisdiction is proper. *Boschetto v. Hansin*,
3 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here, the defendant's motion is based
4 on written materials rather than an evidentiary hearing, "the plaintiff need only make a
5 prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Brayton*
6 *Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (internal
7 quotation marks omitted). The plaintiff cannot "simply rest on the bare allegations of its
8 complaint," but uncontroverted allegations in the complaint must be taken as true.
9 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (quoting
10 *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)). The court
11 "may not assume the truth of allegations in a pleading which are contradicted by
12 affidavit," *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir.
13 1977), but it may resolve factual disputes in the plaintiff's favor, *Pebble Beach Co. v.*
14 *Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).

15 A two-part analysis governs whether a court retains personal jurisdiction over a
16 nonresident defendant. "First, the exercise of jurisdiction must satisfy the requirements
17 of the applicable state long-arm statute." *Chan v. Society Expeditions*, 39 F.3d 1398,
18 1404 (9th Cir. 1994). This requirement is satisfied since "Nevada's long-arm statute,
19 NRS § 14.065, reaches the limits of due process set by the United States Constitution."
20 *See Baker v. Eighth Judicial District Court ex rel. Cnty. of Clark*, 999 P.2d 1020, 1023
21 (Nev. 2000). "Second, the exercise of jurisdiction must comport with federal due
22 process." *Chan*, 39 F.3d at 1404-05. "Due process requires that nonresident
23 defendants have certain minimum contacts with the forum state so that the exercise of
24 jurisdiction does not offend traditional notions of fair play and substantial justice." *Id.*
25 (citing *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945)). Courts analyze this
26 constitutional question with reference to two forms of jurisdiction: general and specific
27 jurisdiction.

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1 1. General Jurisdiction

2 “A court may assert general jurisdiction over foreign (sister-state or foreign-
3 country) corporations to hear any and all claims against them when their affiliations with
4 the State are so ‘continuous and systematic’ as to render them essentially at home in the
5 forum State.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S.
6 Ct. 2846, 2851 (2011). General jurisdiction requires that the defendant engage in
7 “continuous and systematic general business contacts” that “approximate physical
8 presence” in the forum state. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066,
9 1074 (9th Cir. 2011) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466
10 U.S. 408, 416 (1984) and *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082,
11 1086 (9th Cir. 2000)). “The standard for general jurisdiction ‘is an exacting standard, as
12 it should be, because a finding of general jurisdiction permits a defendant to be haled
13 into court in the forum state to answer for any of its activities anywhere in the world.’”
14 *CollegeSource, Inc.*, 653 F.3d at 1074 (quoting *Schwarzenegger*, 374 F.3d at 801). “To
15 determine whether a nonresident defendant’s contacts are sufficiently substantial,
16 continuous, and systematic, [courts] consider their ‘[l]ongevity, continuity, volume,
17 economic impact, physical presence, and integration into the state’s regulatory or
18 economic markets.’” *CollegeSource, Inc.*, 653 F.3d at 1074 (quoting *Tuazon v. R. J.*
19 *Reynolds Tobacco Co.*, 433 F.3d 1163, 1172 (9th Cir. 2006)).

20 There can be no doubt that Virginia Defendants’ contacts with Nevada are
21 insufficient to confer to this Court general jurisdiction over any claims against them. Like
22 the defendant in *CollegeSource*, Virginia Defendants have no office or staff in Nevada,
23 are not registered to do business in Nevada, and do not have an agent for service of
24 process in Nevada. See *CollegeSource, Inc.*, 653 F.3d at 1074. HSI does not argue
25 that Virginia Defendants’ challenged conduct was part and parcel of “continuous and
26 systematic” activity within the state to render them “essentially at home” in Nevada. See
27 *Brown*, 131 S. Ct. at 2851. HSI points to Virginia Defendants’ interactive websites as
28 conferring personal jurisdiction, but as the Ninth Circuit has held, Virginia Defendants’

1 maintenance of an interactive website is insufficient to support general jurisdiction in all
2 states where the website may be accessed from. See *CollegeSource, Inc.*, 653 F.3d at
3 1075-76.

4 **2. Specific Jurisdiction**

5 Specific jurisdiction exists where “[a] nonresident defendant’s discrete, isolated
6 contacts with the forum support jurisdiction on a cause of action arising directly out of its
7 forum contacts.” *CollegeSource, Inc.*, 653 F.3d at 1075. Courts use a three-prong test
8 to determine whether specific jurisdiction exists over a particular cause of action: “(1)
9 The non-resident defendant must purposefully direct his activities or consummate some
10 transaction with the forum or resident thereof; or perform some act by which he
11 purposefully avails himself of the privilege of conducting activities in the forum, thereby
12 invoking the benefits and protections of its laws; (2) the claim must be one which arises
13 out of or relates to the defendant’s forum-related activities; and (3) the exercise of
14 jurisdiction must comport with fair play and substantial justice, i.e., it must be
15 reasonable.” *Id.* at 1076 (quoting *Schwarzenegger*, 374 F.3d at 802)). The party
16 asserting jurisdiction bears the burden of satisfying the first two prongs. *CollegeSource,*
17 *Inc.*, 653 F.3d at 1076 (citing *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). If it
18 does so, the burden shifts to the party challenging jurisdiction to set forth a “compelling
19 case” that the exercise of jurisdiction would be unreasonable. *CollegeSource, Inc.*, 653
20 F.3d at 1076 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

21 **a. Purposeful Direction**

22 “The first prong of the specific jurisdiction test refers to both purposeful availment
23 and purposeful direction.” *CollegeSource, Inc.*, 653 F.3d at 1076. Cases involving
24 tortious conduct are analyzed under the rubric of purposeful direction. *Id.* (citing
25 *Schwarzenegger*, 374 F.3d at 802). In tort cases, the Ninth Circuit asks whether a
26 defendant “purposefully directs” her activities at the forum state and applies an “effects”
27 test that looks to where the defendant’s actions were felt, rather than on where the
28 actions occurred. *Yahoo! Inc. v. La Ligue Contre Le Racism Et L’Antisemitisme*, 433

1 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (quoting *id.* at 803.). [In contract cases, a
2 court inquires into whether the defendant “purposefully avails itself of the privilege of
3 conducting activities or consummates a transaction in the forum, focusing on activities
4 such as delivering goods or executing a contract.” *Yahoo! Inc.*, 433 F.3d at 1206
5 (quoting *Schwarzenegger*, 374 F.3d at 802).] The “effects test” requires that “the
6 defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at
7 the forum state, (3) causing harm that the defendant knows is likely to be suffered in the
8 forum state.” *Yahoo! Inc.*, 433 F.3d at 1206 (quoting *id.* at 803).

9 Here, HSI alleges that Virginia Defendants committed various intentional acts, but
10 it is not clear that these acts were expressly aimed at Nevada, or that Virginia
11 Defendants knew that the harm caused was likely to be suffered in Nevada. On its face,
12 HSI’s argument is as follows: (1) Virginia Defendants engaged in unlawful conduct; (2)
13 that unlawful conduct harmed HSI; (3) HSI is a Nevada company and entered into a
14 contract with VSA governed by Nevada law; (4) therefore the harm caused by Virginia
15 Defendants occurred in Nevada. There are no more allegations concerning how Virginia
16 Defendants’ various violations were targeted at the forum state and caused harm in the
17 forum state. Simply because the tort victim is itself a Nevada corporation does not
18 create purposeful direction against Nevada — otherwise, the requirement for specific
19 jurisdiction would always be met so long as the plaintiff is a citizen of the forum state.

20 Nevertheless, the Court will permit the parties to engage in limited discovery on
21 the issue to determine whether Virginia Defendants’ conduct was directed toward
22 Nevada. See *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th
23 Cir. 1977) (noting that “a court may allow discovery to aid in determining whether it has
24 in personam or subject matter jurisdiction” if “pertinent facts bearing on the question of
25 jurisdiction are controverted or where a more satisfactory showing of the facts is
26 necessary”) (internal quotations and citations omitted). Specifically, discovery will be
27 opened to determine appropriate facts to answer each of the four issues raised on pages
28 21 to 22 of HSI’s Counter Motion. (See dkt. no. 64.) Virginia Defendants’ opposition to

1 limited discovery is meritless. HSI has alleged, albeit in conclusory fashion, that Virginia
2 Defendants purposefully direct actions in Nevada, some of which have given rise to the
3 violations complained about. (Dkt. no. 1 at ¶ 17.) Virginia Defendants' websites may
4 create the level of contacts with Nevada required to establish specific jurisdiction,
5 contingent on the nature of the websites and their role in the conduct HSI complains
6 about. Without the required facts into the scope and nature of such conduct in Nevada,
7 and the extent to which Virginia Defendants conduct business in the state or with
8 consumers in the state, the Court cannot determine whether it may exercise jurisdiction
9 over HSI's claims against Virginia Defendants. Accordingly, limited discovery for "a
10 more satisfactory showing of the facts is necessary." *Id.*

11 **b. Arising out of Forum-Related Activities**

12 As noted above, HSI has failed to establish how Virginia Defendants' conduct is
13 forum-related. Taking HSI's allegations in the Complaint as true, the Court cannot
14 assure itself that Virginia Defendants' alleged misconduct occurred in Nevada.
15 However, as ruled above, the Court opens limited discovery for the parties to present
16 sufficient facts on questions.

17 **c. Reasonableness**

18 Having insufficient facts to conclude whether it can exercise personal
19 jurisdiction over Virginia Defendants, the Court declines to consider the reasonableness
20 of haling Virginia Defendants to this Court until the close of limited discovery.

21 **III. CONCLUSION**

22 IT IS HEREBY ORDERED that Defendants Resort Solutions, Inc., Royal Elite
23 Vacation, LLC, and Royal Elite Exchanges, LLC's Motion to Dismiss (dkt. no. 56) is
24 DENIED.

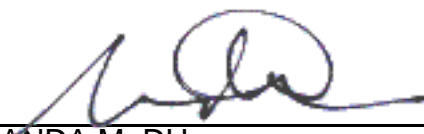
25 IT IS FURTHER ORDERED that Plaintiff Holiday Systems International of
26 Nevada's Counter Motion for Jurisdictional Discovery (dkt. no. 64) is GRANTED as
27 follows:

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1. Limited jurisdictional discovery shall commence beginning on the date of entry of this Order until and including April 8, 2013.
2. Virginia Defendants may file a renewed motion to dismiss for lack of personal jurisdiction after the close of this discovery period, but must file any such motion by May 6, 2013.

IT IS SO ORDERED.

ENTERED THIS 8th day of February 2013.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE